

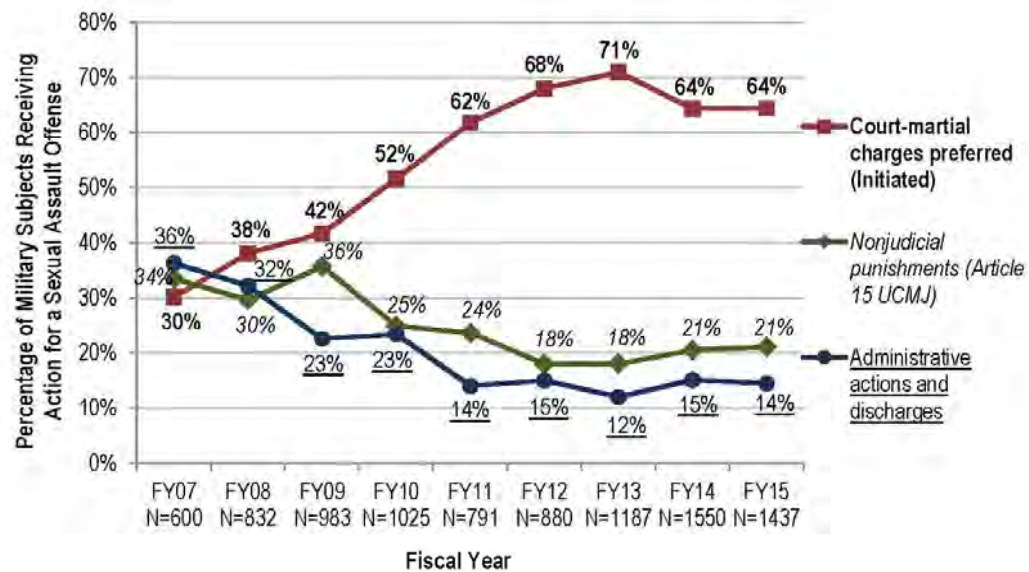
BALANCING A DEFENDANT'S CONSTITUTIONAL RIGHTS AND VICTIM'S RIGHTS IN THE REALM OF RAPE SHIELD LAW

By Elizabeth L. Lippy, Esquire



SEXUAL ASSAULT DILEMMA IN THE SERVICES

- Sexual Assault Prevention and Response (SAPR) Training
- 50% Increase in Reports of Military Sexual Assaults – N.Y. Times (May 1, 2014)
 - SAPRO reported a 2% decrease from 2014-2015 of unrestricted reports, but a 2% increase of restricted reports
- Sexual Assault Prevention and Response Office Statistics from 2011 to 2014:
 - Final dispositions rose 55%;
 - Convictions rose 127%
- National Center for the Prosecution of Violence Against Women – 8% of reports are false
 - 2015 – 3% of allegations unfounded by Command/Legal Review



Notes:

1. Percentages are of subjects found to warrant disciplinary action for a sexual assault offense only. This figure does not include other misconduct (false official statement, adultery, etc.)
2. Percentages listed for some years do not sum to 100% due to rounding.

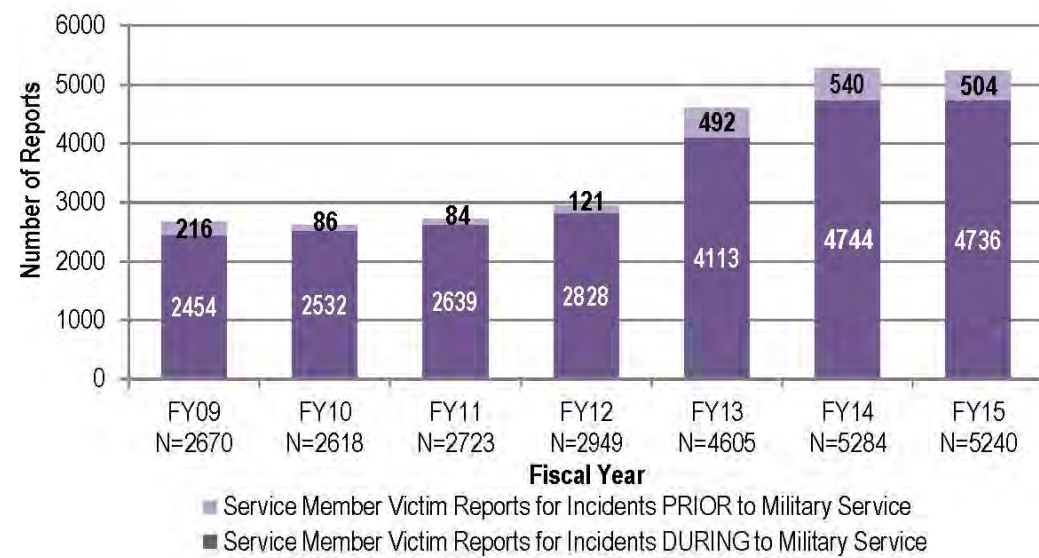
Figure 11: Breakdown of Disciplinary Actions Taken Against Subjects for Sexual Assault Offenses, FY07 – FY15

412 OVERVIEW

- Comparative analysis with FRE
- What constitutional rights are implicated?
- What can be introduced?
- How is it decided?
- Interpretations of 412(c) post-*Gaddis*
- Policy Implications

PURPOSE AND POLICY OF 412

- Protect the victim from humiliation
- “Rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. *Michigan v. Lucas*, 500 U.S. 145 (1991).
- Shield a victim’s privacy
- Encourage disclosure of offenses
 - “By affording victims protection in most instances, the rule encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.”
Notes of Advisory Committee on proposed 1994 amendment, F.R.E. 412.



FEDERAL RULE OF EVIDENCE 412

- General bar to prior sexual conduct of the victim
- (b) Exceptions:
 - (1) Criminal Cases. The court may admit the following evidence in a criminal case:
 - (A) – Physical source;
 - (B) – Priors with the defendant to show consent; and
 - (C) – EVIDENCE WHOSE EXCLUSION WOULD VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS

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MILITARY RULE OF EVIDENCE 412

- General bar to prior sexual conduct of the victim
- (b) Exceptions:
 - (A) – Physical source;
 - (B) – Priors with the defendant to show consent; and
 - (C) – EVIDENCE THE EXCLUSION OF WHICH WOULD VIOLATE THE CONSTITUTIONAL RIGHTS OF THE ACCUSED

CONSTITUTIONAL RIGHTS

- What rights?
 - Confrontation Clause of the 6th Amendment – right to confront and cross-examine one's accuser
 - Compulsory Process Clause of the 6th Amendment – right to present a defense
 - Due Process Clause of 5th and 14th Amendment
- How are Rape Shield Laws constitutional?
 - Courts have held that “[t]he right to present relevant testimony is not without limitation. The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. Thus, trial judges retain wide latitude to limit reasonably a criminal defendant's right to cross-examine a witness based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.” See *Michigan v. Lucas*, 500 U.S. 145, 149 (1991).

WELL-ACCEPTED AREAS

- Examining the motivation of the complaining witness;
- Proving the sexual knowledge or sophistication of the complaining witnesses;
- Showing a pattern or practice of sexual behavior; and
- Credibility issues.

MOTIVATION OF THE VICTIM

- *Olden v. Kentucky*, 488 U.S. 227 (1988) – The 6th Amendment confrontation rights require the ability to cross-examine a complainant to test for bias and motive to falsify charges based on relationships
 - *However, that right may be limited regarding how many details to delve into*
- *Davis v. Alaska*, 415 U.S. 308 (1974) – Familial tensions between parent and child may be admissible
- *Other types of motivations that have been ruled admissible include:*
 - *Disputes over disciplinary rules*
 - *Disapproval or rejection of a relationship*
 - *Fears that a companion will react in violence or anger*

SEXUAL KNOWLEDGE OF THE VICTIM

- In cases involving minors, Defendants may assert the right to introduce evidence of other sexual acts of the victim to prove the source of knowledge of vocabulary or sophistication
- States are split regarding the admissibility under this theory but most courts limit the extent of evidence
- Cases allowing evidence – *U.S. v. Bear Stops*, 997 F.2d 451 (8th Cir. 1993)(constitutional error in excluding evidence of prior sexual abuse of six-year-old victim to refute or explain sexual sophistication); *State v. Rolon*, 777 A.2d 604 (Conn. 2001)(excluding proof of prior assaults was constitutional error as proof was critical to allowing defendant to rebut the inference that he is the source of the child's knowledge)
- Cases excluding evidence – *U.S. v. Never Misses A Shot*, 781 F.3d 1017 (8th Cir. 2015)(upholding exclusion of evidence that minor victim was previously assaulted, holding that admitting such proof would mean that “every child victim that has been molested by someone other than the defendant would be subject to questioning on these matters; court can shield victim from “embarrassment and shame”); *State v. Jones*, 490 N.W.2d 787 (Iowa 1992)(abuse five years earlier was too remote to be probative).

PATTERN OR PRACTICE OF VICTIM

- May have a constitutional right to prove a pattern of distinctive, consensual sexual behavior by the alleged victim that is highly similar to the facts of the incident being charged.
 - *Gagne v. Booker*, 596 F.3d 335 (6th Cir. 2010)
- Must be similar
- Must be enough to create a pattern

CREDIBILITY

- Constitutional entitlement to bring out facts that conflict with the picture presented by the prosecution?
- Examples of admissibility:
 - Sexual orientation makes it unlikely victim would consent (*State v. Williams*, 487 N.E. 2d 560 (Ohio 1986));
 - Refuting suggestions that victim was sexually inexperienced or virginal (*U.S. v. Powell*, 226 F.3d 1181 (10th Cir. 2000));
 - Refuting the prosecutor's picture of victim's relationship with the defendant (*State v. Reiter*, 672 P.2d 56 (Or. App. 1983));
 - Refuting explanation of why the accusations came forward in the way that they did (*State v. Lantz*, 607 P.2d 197 (Or. App. 1980));
 - Prior inconsistent statement regarding sexual history.

PROCEDURE TO DETERMINE ADMISSIBILITY/ FRE 412(C)

- (1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:
 - (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
 - (B) do so at least 14 days before trial unless the court, for good cause sets a different time;
 - (C) serve the motion on all parties; and
 - (D) notify the victim or, when appropriate the victim's guardian or representative.
- (2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the hearing must be and remain sealed.

FEDERAL RULE OF EVIDENCE 412(C)

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 - (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
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 - (C) serve the motion on all parties; and
 - (D) notify the victim or, when appropriate the victim's guardian or representative.

MILITARY RULE OF EVIDENCE 412(C)

- (1) A party intending to offer evidence under subsection (b) must –
 - (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and
 - (B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

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MILITARY RULE OF EVIDENCE 412(C)

- (2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. ..

FEDERAL RULE OF EVIDENCE 412(C)

MILITARY RULE OF EVIDENCE 412(C)

- (3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil.R.Evid. 403.

THE BIG DIFFERENCE

FRE 412(C)

- File 14 days before trial
- 412(c) is silent regarding balancing test
 - HOWEVER, see FRE 412(b)(2) Civil Cases – in a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

MRE 412(C)

- 5 days beforehand
- The balancing test in 412(c)(3) - If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil.R.Evid. 403.

TOUGH ACT TO BALANCE



Accused's Constitutional
Rights

Victim's Privacy Rights & 403

MRE 412(C) HISTORY

- Victim's privacy rights are a legitimate interest– *U.S. v. Sanchez*, 44 M.J. 174 (C.A.A.F. 1996) and *U.S. v. Banker*, 60 M.J. 216 (C.A.A.F. 2004)
 - Banker two part tango – 1. relevance under 401
 - 2. conduct balancing test to determine whether the probative value of such evidence outweighs the danger of unfair prejudice.
 - EXCEPT under 412(B)(1)(c) – which is subject to a distinct 3 step analysis
 - 1. relevance; 2. whether the evidence is “relevant, material, and favorable to the defense” and therefore “necessary”; 3. whether probative value outweighs dangers
 - Specifically held that the 412 balancing test not only included 403 factors, but also prejudice to the victim's legitimate privacy interests.

STATUTORY AMENDMENT

- 2007 – the President changed the language of 412 to reflect the *Banker* and *Sanchez* and clarified that:
 - Under MRE 412, the evidence must be relevant for one of the purposes in division (b);
 - In conducting the balancing test, the inquiry is whether the probative value of the evidence outweighs the danger of unfair prejudice to the victim's privacy; and
 - Even if the evidence is admissible under 412, it may still be excluded under 403.
- Post amendment – *U.S. v. Roberts*. 69 M.J. 23 (C.A.A.D. 2010) – “[I]f the military judge determines the evidence is relevant and material, he performs the M.R.E. 412(b)(3) balancing test (whether the probative value of the evidence outweighs the danger of prejudice to the victim's privacy) to determine whether the evidence is favorable to the accused's defense.”

U.S. V. GADDIS

- *United States v. Gaddis*, 70 M.J. 248 (C.A.A.F. 2011)
- “We hold that the balancing test in M.R.E. 412(c)(3) is not facially unconstitutional. However, its current iteration – which purports to balance the “alleged victim’s privacy” against the probative value of the evidence – is needlessly confusing and could lead a military judge to exclude constitutionally required evidence. The “alleged victim’s privacy” interests cannot preclude the admission of evidence “the exclusion of which would violate the constitutional rights of the accused.”
- Determined that the purpose of the rule is proportionately served by the general rule of exclusion as well as the prior version of the balancing test that “the probative value of such evidence outweighs the danger of unfair prejudice.”

GADDIS, CONT'D

- Discussed 3 options of how the balancing test would be applied
 - 1. considering the privacy interest of the victim will yield a constitutionally valid result when applied to evidence that is both constitutionally required and whose probative value outweighs the danger of unfair prejudice;
 - 2. considering the privacy interest of the victim will yield a constitutionally valid result when applied to evidence that is not constitutionally required and whose probative value does not outweigh the danger of unfair prejudice
 - 3. the only time would be unconstitutional is when a judge excludes evidence, the exclusion of which would violate constitutional rights because the probative value did not outweigh the danger of unfair prejudice to the alleged victim's privacy.

GADDIS ASSUMPTIONS

- Indicated that the balancing act from *Banker* incorrectly applied the FRE civil case balancing test.
- “...balancing constitutionally required evidence against the privacy interest of the victim before admitting it is necessary to further the purpose of the rule,... is simply wrong.”
- That, as written, the balancing test is a nullity with respect to (b)(1)(c) and that the military judge should only weigh 403 factors

POST-GADDIS

- Judge Effron's concurring opinion – "The policy question of whether to address victim interests through the balancing test in the rule is a matter for the President and Congress to decide. Until the rule is changed, it remains in effect, subject to our obligation to interpret the rule in accordance with the Constitution and applicable legislation." *Gaddis*, 70 M.J. at 260 (concurring opinion by C.J. Effron).
- Statutory change proposals – in 2011 – the Joint Service Committee proposed changing 412, but said proposal was not signed by the President; Further, 5/15/13 – an Executive Order was signed amending the manual for Courts-Martial but no changes to 412
- Conundrum – 1. follow 412 as written and risk being overturned; 2. follow MRE 412 as written but do not mention privacy rights; 3. disregard 412 as written and follow the *Gaddis* dictum.
- Military cases are no longer weighing the privacy interests of the victim

GADDIS INTERPRETATION OF VICTIM RIGHTS V. OTHER COURTS INTERPRETATIONS

- Every court that has considered the specific issue of whether victim privacy is a legitimate governmental issue has found that it is
 - *Michigan v. Lucas*, 500 U.S. 145 (1991); *Olden v. Kentucky*, 488 U.S. 227 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Delaware v. Fensterer*, 474 U.S. 15 (1985); *Davis v. Alaska*, 415 U.S. 308 (1974); *Chambers v. Mississippi*, 410 U.S. 284 (1973); and *Washington v. Texas*, 388 U.S. 14 (1967).
- Although FRE has never contained language of privacy rights in the balancing test, federal courts determine what is constitutionally required by conducting a balancing test that weighs the probative value v. privacy interests.
 - See *United States v. Pumpkin Seed*, 572 F.3d 552 (8th Cir. 2009); *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008); *State v. Green*, 260 S.E.2d 257, 261 (W. Va. 1979); *Dolinger v. Hall*, 302 F.3d 5 (1st Cir. 2002); *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997); *United States v. Seibel*, 2011 U.S. Dist. LEXIS 88607 (D.S.D. August 9, 2011); *Grant v. Demskie*, 75 F.Supp. 2d 201 (S.D. N.Y.1999); *United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000); *Petkovic v. Clipper*, 2016 U.S. Dist. LEXIS 94532 (N.D. Oh. 2016); *Buchanan v. Harry*, 2014 U.S. Dist. LEXIS 66665 (E.D. Mich. 2014); and *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012).

POLICY IMPLICATIONS

- Failing to include a victim's privacy rights
- Not applying the rule as written
- Discovery hearings/fishing expeditions
- Discouraging disclosure
- The role of the SVC with 412 hearings

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